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Introduction

This is not a work of fiction, although I wish it were. Some of the cases described here could recall the imagery evoked by Mary Shelly, author of *Frankenstein; or, The Modern Prometheus*, who tells a horror story about a young rogue scientist who creates an unsightly monster through clandestine, aberrant experimentation. Although Frankenstein is the name of the monster's creator, Dr. Victor Frankenstein, readers would be forgiven for debating who the real monster happens to be. In *Policing the Womb*, the story of Marlise Muñoz comes to mind – brain-dead, decomposing in a Texas hospital, forced by state legislation to gestate a barely developing fetus while her body decays and the anomalies in the fetus mount. Eventually, it is reported that the fetus is hydrocephalic, which means severe brain damage in this case and water or fluid developing on its brain. Medical reports also show that the fetus is not developing its lower extremities. The state knows brain death is irreversible.

The hospital forces Marlise's dead body to shake, placing it on a bed that constantly, violently moves, which makes the dead woman's eyes flap open and shut. Likely frightening to some hospital staff, they decide to tape Marlise's eyes shut. Even if Marlise could see anything, which is unlikely, because she is dead, now no one needs to look into her eyes to search for any signs of life. If the state believes, despite well-accepted medical science, that she is alive, it has now taken away her sight and forced her into a state of blindness, while her body is poked and prodded. Marlise's shaking corpse stays hydrated through tubes that bring fluids into the body. Somehow, the hospital finds a way to pipe away the waste. Everyone – including even the state – agrees that really she is an incubator. This is why the Texas law exists.

This is not the novel *The Handmaid's Tale*, a dystopian opus written by Margaret Atwood, made exceedingly relevant today. The shaking bed is not in the totalitarian fictional state of Gilead. No, this is Texas. This is why the state forces machines to be attached to Marlise's body – to keep her organs functioning until they give out. The machines are not keeping her alive; they are simply keeping her organs viable. This is why the hospital cleaves into her body with

slicing, lacerating, and stitching tools, tapes her eyes shut, pumps her with fluids, and then drains other liquids from what remains of her. Her decaying has nothing to do with senescence or aging. Rather, it is the typical decomposition characteristic of brain-death cases.

Hoses, pipes, and cylinders serve as the conduits between the state and Marlise's decaying body. This is known as mechanical support. The hospital cuts a hole into Marlise's neck to create an opening in the trachea. She will receive a tracheotomy. The widower, Erick, objects. This is a desecration of Marlise's body. The hospital must be used to ignoring Erick's objections. He said no and objected to the second resuscitation attempt; the hospital did it anyway. He sits there daily as her light brown skin transitions from supple to hard – like a mannequin, Marlise's father said. Her body loses muscle tone and begins to smell. Erick comments on the smell. That smell lingers. It is not the smell of Marlise's favorite perfume or flowers from the tidy hospital gift shop. No, the smell that fills the room and Erick's nostrils – and those of anyone who visits the room – is that of a rotting body.

No one, except perhaps the select group of antiabortion protesters outside, is confused about this: Marlise is dead. Outside, someone tells a filmmaker, Rebecca Haimowitz, just give Marlise a week. You'll see, he says. A week or two will turn this all around, he says. This particular protester, captured in Haimowitz's documentary *62 Days*, travels to cases like this. She told me he's like a professional at this. A thought comes to my mind – *Sleeping Beauty*, the 1959 animated musical produced by Walt Disney. It is based on the seventeenth-century French fairy tale *La belle au bois dormant*, by Charles Perrault. In the fairy tale, a beautiful princess is forced into hypnotic slumber; the spell she is under will only be broken by the magical kiss of the prince. The prince will awaken her.

However, Marlise's real-life prince, Erick, does not harness this magic. Or perhaps the state has dethroned Erick. But if that is the case, who is the new prince? The Texas legislature? In any case, Erick Muñoz lacks any special powers to rouse Marlise, despite what the protesters outside the hospital claim. In fact, Erick no longer has rights over his wife's body until the state is satisfied with Marlise's gestation and cuts open her body to remove the fetus. It turns out that marriage and the rights of next of kin mean very little when the state takes control of a pregnant woman's body in order to protect the fetus. The state refers to this as fetal protection. In this case, the state is protecting the fetus from Marlise's husband and her parents, who say let her rest in peace.

The hospital serves as a surrogate or agent of the state. This is not a role its staff have asked for, but some may fear the consequences if they do not follow the state's legislation. The medical staff know that she is dead, but they must follow the Texas law, which ignores death, do-not-resuscitate orders, medical directives, and living wills only if the patient is pregnant.

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On Tuesday, November 8, 2016, Donald Trump secured the presidency of the United States. In a startling victory, Mr. Trump soundly defeated Secretary Hillary Clinton by securing the most Electoral College votes in that election, a feat accomplished in part by breaking through the so-called blue wall of the Upper Midwest, which consistently voted Democratic for decades. The political fabric that held the blue wall together proved too porous and fragile. It disintegrated in a tide of fear associated with the economy, immigration, and job loss.

As the blue wall dissolved, the vulnerability of reproductive rights in the United States became more glaringly apparent. As time would tell – but anyone paying close attention at the time could predict – a Trump administration would bring about a serious threat to the preservation of reproductive healthcare rights such as abortion and possibly contraceptive healthcare access. More optimistic views cautioned against such concerns. However, in light of Mr. Trump's campaign promises to fill the Supreme Court with justices committed to overturning *Roe v. Wade*, the decision upon which abortion rights are founded, the safeguarding of women's fundamental rights to reproductive autonomy and constitutional equality takes on new meaning and urgency. However, the President alone cannot end abortion rights; courts and legislatures matter too. That's why the Republican Party platform, which explicitly references opposition to abortion thirty-five times, should also cause concern. The tragic result of these strategic moves, as well as efforts at the state level to strip away reproductive health options, is not only to cripple access to safe, legal abortions but also to undermine women's constitutional rights and ultimately their basic health.

Prior to the 2016 presidential election, scholars imagined the possibility of a Hyde Amendment repeal. The fortieth anniversary of that law, which prohibited the use of federal dollars to terminate a pregnancy, coincided with the possible election of the first female President of the United States. Arguments that discriminatory distribution of government benefits produces coercive interference with the exercise of a fundamental right and that government cannot be discriminatory in how it distributes benefits were eager to be unpacked and remain so.

On deeper reflection, however, the fundamental threat to reproductive healthcare was already under way, even before Donald Trump's election and the elevation of two conservative, antiabortion judges to the Supreme Court, Justices Brett Kavanaugh and Neil Gorsuch. That is, the fundamental right to an abortion was already more illusory than real for poor women in light of robust antichoice legislating in the shadows of *Roe*. Financing abortion was only one significant obstacle in their way. Other barriers to reproductive rights that have emerged in recent years prove as intractable and cumbersome as the inability to finance an abortion. For example, the ability to carry a pregnancy to term without dying in the process or being arrested for "endangering" the fetus are shocking new norms. Fetal protection and personhood efforts are not only on the rise in the United States but,

like prior "tough on crime" rhetoric, they serve as the bases on which to justify myriad unconstitutional and unethical interventions in women's lives.

In Utah, for example, Governor Gary Herbert recently signed into law the Criminal Homicide and Abortion Revisions Act,[1] which specifically applies to miscarriages and other fetal harms that result from "knowing acts" committed by women and girls. A prior version of the bill drafted by state representative Carl Wimmer (Utah) sought to authorize life imprisonment for pregnant women who, during pregnancy, engage in reckless behavior that could result in miscarriage and stillbirth. Representative Wimmer informed reporters that he was crafting similar "model legislation" for other states. Interestingly, Wimmer's original bill advanced through both the Utah Senate and House before the American Civil Liberties Union intervened and drew attention to the legislation and its consequences for girls and women in the state of Utah. Could a woman's unhealthy eating habits be considered reckless during pregnancy? Or continuing to work or serve in the military?

Wimmer sponsored the legislation after Jane Doe, a minor, offered Aaron Harrison, a twenty-one-year-old, $150 to beat her up in order to induce a miscarriage. Jane Doe's boyfriend threatened to leave her if she did not terminate the pregnancy. Ultimately, both Jane Doe and Harrison were criminally punished, although the baby survived and was later adopted. Harrison pleaded guilty to second-degree felony attempted murder and was sentenced to five years. Jane Doe pleaded no contest to second-degree felony and was ordered to be placed in Utah's Juvenile Justice Services.

Unsatisfied with these outcomes, Representative Wimmer claimed, "the judge is absolutely stretching . . . there's no way the judge believes the Utah Legislature left open this loophole. I guarantee it will be closed this next session." With very little debate, his bills advanced. To understand just how severe Representative Wimmer's bill is, a teenage girl like Jane Doe could face from fifteen years to life in prison for a similar act if the fetus does not survive.

Even while Representative Wimmer claimed that his legislation was about protecting the health and safety of women and girls, and the Utah legislature seemingly concurred, their inaction in relation to sex education revealed something far more problematic and troubling. As one journalist reported, "ironically, just three days after Utah's House and Senate overwhelmingly passed Rep. Wimmer's Criminal Homicide and Abortion Amendments bill," which could criminally punish girls with up to life imprisonment for trying to induce an abortion, "the Senate refused to even debate legislation that would have allowed teachers to provide comprehensive sex education to students who had their parent's permission."[2] In Utah, "current state law says teachers can't advocate or endorse the use of contraceptive methods or devices," notwithstanding the fact that in Utah twelve teenage girls become pregnant every day.[3]

However, Utah is not alone. Across the nation, attacks on women and surveillance of their bodies, although rarely making the news, result in arrests of pregnant women

for falling down steps, charges of first-degree murder for attempted suicide, prosecutions for stillbirths, and plea deals that include sterilization. And that is not all: the tale of horrors is both wide and deep. There are the threats of arrests for refusing cesarean sections, denial of lifesaving care in order to enhance the possibility of fetal survival (even if it kills the pregnant woman), court-ordered bed rest, and legislation in some states that grant gametes and embryos personhood and legal rights, among others.

This policing also affects girls, with male-led state legislatures enacting policies that remove sex education from schools. A number of states now shift toward abstinence-only teaching, making it an offense to actually teach children about their bodies, intercourse, contraception, and pregnancy. The results have been deadly. The United States has the highest rates of sexual disease and infection transmission in the developed world. Young people in the United States are more likely to contract chlamydia, gonorrhea, human immunodeficiency virus (HIV), and other sexual diseases than their peers in England, France, Germany, Italy, Portugal, Spain, Switzerland, and other nations. They are also more likely to experience unintended and unwanted pregnancies.

For all the handwringing and legislating in the United States – restricting information and rights available to girls and women and claiming moral authority over pregnancies – the results are devastating for women, their families, and the economy. According to research conducted at the Guttmacher Institute, a research clearinghouse on reproductive health, the unintended pregnancy rate "is significantly higher in the United States than in many other developed countries."[4] Nearly half of the pregnancies in the United States are unintended. The highest rates of unintended pregnancies are among the poor, adolescents, and women with the least education. For example, among teenagers between fifteen and nineteen years old, 75 percent of their pregnancies are unintended.[5] Not all of the pregnancies will result in childbirth, but a significant percentage will, often interrupting education and employment. Overwhelmingly, unintended pregnancies are publicly funded and the public funding naturally extends to children of poor mothers.

Yet, the state also punishes, stigmatizes, and stereotypes these mothers for becoming pregnant and relying on public welfare like Temporary Assistance for Needy Families, otherwise known as TANF. The Trump administration has proposed eliminating food assistance for millions of Americans and restricting food choice for those fortunate enough to retain their benefits. In what some pundits are calling a "major shake-up" of perhaps the nation's most important safety net program – the Supplemental Nutrition Assistant Program (SNAP), commonly referred to as "food stamps" – the Trump administration proposes limiting the purchases families can make with their food subsidies, which are already heavily monitored and restricted. Already, families that receive SNAP cannot purchase soap, paper products, household supplies, hot foods, or vitamins with their benefits.[6] The federal government lists "hot food" as a luxury item along with "grooming items" as well as food that can be eaten at the store. And while a woman could purchase a birthday cake for her

child using SNAP benefits, the state monitors if the "value of the non-edible decorations" exceeds 50 percent of the "purchase price of the cake." If it does, the cake cannot be purchased with SNAP benefits.

The Trump administration's proposal would gut the food program by $213 billion dollars – almost 30 percent of its current budget. For families that receive $90 per month or more, roughly half of their benefits would be in the form of a USDA food package. This package would consist of "shelf-stable milk, ready to eat cereals, pasta, peanut butter, and beans." There would be fruit and vegetables, but none fresh, only canned. How could legislators and policymakers possibly believe such policymaking is good for mothers and their babies?

Individual states are also sometimes punitive toward poor single mothers, monitoring how they spend their aid, including surveilling what foods they purchase, monitoring their bank accounts, and enforcing drug testing as a condition for receiving aid. So few women test positive for illegal substances that the testing is economically inefficient and cruel. As Professor Joan Maya Mazelis wrote in *The Hill*, "Florida taxpayers, for example, spent $118,140 to reimburse people who tested negative for the cost of testing, which was $45,780 more than the state saved by denying benefits to the 2.6 percent of applicants who tested positive. And other states are doing the same thing over and over and expecting different results."[7]

As Lauren Gellman predicted twenty years ago in *Poverty & Prejudice: Social Security at the Crossroads*, "The fact that individuals will be forced to find employment within two years is not the crux of the problem. The uncertainty and skepticism comes when one considers that there are not enough jobs that pay a high enough wage to support a mother and her children. As a result, in the long run, instead of seeing a greater number of people on their feet, supporting themselves, we may see a larger number of individuals living in poverty, especially children."[8] She was right. The state's tough love on welfare shows disdain and disregard for the dignity of poor people as well as their children.

The devastating and demoralizing consequences of the state's policing of women's reproduction results not only in the prurient surveilling of what food they purchase and whether decorations happen to be on their child's birthday cake or a non-edible gourd is purchased at Halloween, but also their conduct during pregnancy. Disturbingly, some state and federal officials have also begun secretly monitoring the menstrual cycles of women and girls. The most devastating consequence of the precarious double bind in which the state handcuffs women and girls with the potential to become pregnant is America's alarming maternal mortality rate.

This of course belies the punditry of legislators who claim their policing of women and girls reflects care and concern about keeping women safe and healthy. The paternalistic argument that antisex education, anticontraception, and antiabortion measures benefit women and girls simply does not bear that out, leading instead to high rates of unintended pregnancies, maternal mortality, and infant mortality. Even so, legislators seek to justify their attacks on reproductive rights as a means of

safeguarding women and, sadly, courts often defer to this sophistry. However, federal data shows how dire birthing in the United States happens to be.

Simply put, women in the United States now die during pregnancy at unprecedented rates.[9] According to Central Intelligence Agency (CIA) data, the United States ranks about fiftieth in the world for maternal safety, behind blighted, war-torn nations struck by civil wars and genocide like Serbia and Bosnia. As the data shows, Saudi Arabia, Kazakhstan, and Libya are some of the nations where the maternal mortality rate is lower than in the United States. For those who have paid attention, this does not come as a surprise.

In 2000, nations throughout the world agreed to participate in the United Nations Millennium Development Goals (MDGs), one of the key objectives of which specifically targeted reducing pregnancy-related deaths.[10] Nearly two dozen international organizations and 191 member state nations publicly committed to achieve eight goals, among them reducing maternal mortality. All but a few nations showed demonstrable progress. The United States was among the few nations to fail or regress. Maternal mortality rates actually increased in the United States at a rate of nearly 140 percent. As one reporter noted, "Just as the world turned its attention to this matter with marked success, the United States stopped offering data and began moving backward."[11]

What accounts for this? Texas holds some clues. Texas has the regrettable distinction of the deadliest state in the developed world in which to birth a child.[12] As one commentator explained, "the Texas maternal mortality rate 'now exceeds that of anywhere else in the developed world.'" It is also a state with an overwhelmingly male legislature, which prides itself on enacting the most restrictive abortion laws in the nation.[13] As *The Texas Tribune* wrote in 2017, "Once again, the Texas Legislature is mostly, white, male, middle-aged."[14] At that time, men held nearly "80 percent of the Legislature's seats." And that legislative body filed nearly twenty antiabortion bills in 2017 alone. This is not surprising, however, because the Texas legislature prides itself on legislative efforts to criminalize and suppress reproductive rights and, despite a recent defeat in the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*, the legislature successfully closed down clinics that perform abortions. What they failed to account for is that so many of those clinics provided care for the overlooked and underserved poor women in their state.

Sadly, Texas is not alone. Other states follow a similar destructive path, including Mississippi[15] and Louisiana.[16] In these states, legislators have left, respectively, 1.5 and 2.4 million female residents with only one abortion clinic remaining in their states. Alabama, Kentucky, Georgia, and others similarly show efforts to eviscerate reproductive rights on the one hand and staggering rates of maternal mortality on the other. A common thread in these abusive practices is the impact they have on Black women.

For example, Louisiana exceeds the nation's maternal mortality rate by a dramatic proportion. In particular, while maternal mortality is dire among Black women in

the United States generally, in Louisiana the incidences of death are far greater. The average maternal mortality for white women is 18.1 in the United States and 27.3 in Louisiana. For Black women, the U.S. incidence of maternal mortality is 47.2 and in Louisiana 72.6. Overall in the United States, Black women are nearly four times more likely than white women to die due to a pregnancy-related cause. This is why thinking about these matters requires more than a reproductive rights framework, but rather one of reproductive justice.

The intergenerational suffering of Black women in these former slave states remains visceral and part of the horrific legacies of institutionalized chattel bondage. For Black women in Texas, Louisiana, Alabama, Georgia, West Virginia, and elsewhere, not only is their reproductive freedom illusory, but staying alive during pregnancy is not a guaranteed, foregone conclusion. Private reproductive bondage in these former slave states is now public. That is, where planters once controlled Black women's reproduction on their plantations and elsewhere, now the state controls what Black women (and others) may do with their bodies during pregnancy. In neither case has the regard for Black women resulted in the autonomy, independence, or privacy deserved.

Staggering maternal mortality rates in these states and others come as little surprise considering that dozens of clinics that provided contraceptive care, breast, ovarian, and cervical cancer screenings, and testing for sexually transmitted diseases shuttered in the wake of antiabortion lawmaking. When clinics closed, many women in those regions had no other health providers, but only crisis pregnancy centers.

The erosion of reproductive healthcare rights and access, as well as the criminalization of women's conduct during pregnancy, underscore the importance of scrutinizing the legislature, Supreme Court, and lower judicial branches. Even while *Planned Parenthood v. Casey* and the basic principles of the Supreme Court's decision in *Roe v. Wade* still stand, these cases are increasingly vulnerable and regularly under attack. A study published by the American Civil Liberties Union reports that 35 states proposed over 300 abortion rights restrictions in 2013 alone.[17] What explains this? In part, this can be linked to the rise of the Tea Party, an evangelical, conservative movement that swept into American legislatures shortly after the election of Barack Obama, the nation's first Black President. Along with efforts to gut reproductive rights, voting rights became vulnerable and gerrymandering ensued, and the flames of anti-immigration stirred to successful effect. During the period 2010–15, state legislatures proposed and succeeded in enacting more regulations to restrict abortion and contraceptive access than in the prior three decades combined.[18]

In 2015, the Guttmacher Institute published a report placing this legislative movement in context. It explained, "The goal of antiabortion advocates is to make abortion impossible to obtain by layering multiple restrictions, even though many claim that their motivation is only to protect women's health."[19] These efforts to

derail women's privacy rights are well funded and coordinated in legislatures throughout the nation. Seventy antiabortion restrictions were enacted in twenty-one states[20] – the second highest number of restrictions passed in one legislative session. In fact, "[n]o year from 1985 through 2010 saw more than 40 new abortion restrictions; however, every year since 2011 has topped that number."[21]

Despite Texas, and increasingly other states, urging women and teens to engage in abstinence-only intimacy, unmarried and unprotected sexual activity and unintended pregnancies have remained at the same level or increased and not declined. This is true in other Republican strongholds. At the same time, legislatures in traditionally Republican states have sought to restrict abortion access, causing a threat not only to the fundamental right to terminate a pregnancy but also to women's health. As one woman told a Texas healthcare worker, "I will terminate this pregnancy. . . . So how about I tell you what I have in my cupboards, under my sink and in my medicine cabinet, and you tell me what to use and how to use it in order to do my own abortion."[22] In that case, the pregnant woman was pleading with a healthcare worker whose clinic (along with dozens of others) abruptly closed in the wake of a newly enacted and restrictive Texas statute targeting the provider – a circuitous legislative way of defeating a fundamental right.

In Texas, lawmakers believed that "[t]he fight for the future of [the state] is just beginning."[23] In the summer of 2013, Texas state Senator Wendy Davis urged lawmakers to vote down a bill that, if enacted, would decisively restrict women's reproductive health rights in that state. Warring factions of reproductive rights advocates and antichoice advocacy groups assembled in the state's capitol to monitor the progress of the omnibus abortion bill – arguably containing the most restrictive abortion regulations enacted in Texas since *Roe v. Wade*.[24] As lawmakers shepherded the bill through special sessions of the legislative process, impassioned floor speeches that professed either the sanctity of fetuses or the fundamental nature of woman's reproductive healthcare rights echoed throughout the halls of the Texas State Capitol.[25] In the end, however, abortion rights proponents lost.

Despite robust efforts to thwart the passage of legislation referred to as H.B. 2 (the legislation deceptively lacked any outward reference to abortion or reproductive healthcare in its title) and to weaken its substantive provisions,[26] the Texas legislature voted to enact the law. In the first special session, Texas Democrats proposed twenty different H.B. 2 amendments aimed at lessening the severity of restrictions by creating specific exemptions for teen mothers or victims of rape and incest in different provisions of the law. None of these amendments advanced; all were rejected along partisan party-line votes, demonstrating the highly partisan nature of the abortion rights issue in Texas. Texas lawmakers celebrated the legislation as one of the most restrictive laws to limit women's access to abortion in the country. Legislators boasted that they were pioneering "some of the toughest restrictions on abortion in the country."[27] Women's rights advocates argued that the Texas legislature delivered a knockout blow to women's healthcare rights.[28] In the end, strategic

lawmaking at the state level – what could be called strategic federalism – successfully intervened against precedents established in *Roe v. Wade*[29] and *Planned Parenthood v. Casey*[30] to undermine women's reproductive healthcare rights and ultimately the authority of the Supreme Court.

In recent years, scholars and activists have described this type of lawmaking as part of the "war on women." The war metaphor signifies the battles fought in state houses, the death threats aimed at abortion clinic staff, and even the violent campaigns to deter and block women from entering abortion clinics. Professor Johanna Schoen explains that antiabortion activists became confrontational when they sensed in the 1970s and 1980s that legislative action might not render the victories they desired.[31] Copiously documented evidence details the harsh impacts produced by laws targeting women's reproductive healthcare rights, including serious hurdles to access abortion rights, criminalization of certain conduct during pregnancy, and even restrictions on pregnant women's medical autonomy at the end of life.[32]

Lawmakers refer to the latter as "pregnancy exclusion laws," because that type of legislation functions to literally exclude or prevent pregnant women from autonomous decision-making at the end of life. This turn to policing the womb is so dramatic that Civia Tamarkin, an award-winning journalist, came out of retirement to make a film, *Birthright*, chronicling such cases. Others have done the same, including Rebecca Haimowitz, whose film *62 Days* tells the story of a decomposing, brain-dead pregnant woman in Texas, forced to stay on life support in order to gestate her fetus over her family's objections. In the film, the husband tearfully recounts that one of the most painful things to bear was the smell of his dead wife, hooked up to feeding tubes and various machines, rotting away as the state of Texas forced her to gestate their fourteen-week-old fetus.

Why this type of lawmaking? Some commentators and scholars point to conservative values surreptitiously influencing legislatures or pressure from the alt-right in the political and legislative processes.[33] Professor Caitlin Borgmann says that when conservatives portray fetuses as persons, it influences and ultimately pervades how the public understands and talks about abortion. She and other scholars believe that conservatives have successfully shaped public discourse on abortion such as "to have the embryo or fetus treated as a legal person in many contexts outside abortion." She explains that "[v]iewed in this light, abortion restrictions are transformed into measures that promote women's health and well-being and that protect women from the exploitation and deception of abortion providers."[34]

Some scholars argue that antiabortion efforts reflect religious fundamentalism creeping into the legislative space.[35] Still others maintain that implicit and explicit biases explain antichoice lawmaking; they argue that men simply do a poor job legislating on behalf of women. Catharine MacKinnon argues that because "pregnancy can be experienced only by women, and because of the unequal social predicates and consequences pregnancy has for women, any forced pregnancy will always deprive and hurt members of one sex only on the basis of gender."[36] Reva